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In The
Supreme Court of the United States

MICHAEL FITZGERALD, TREASURER,
STATE OF IOWA,

Petitioner,

v.

RACING ASSOCIATION OF CENTRAL IOWA,
IOWA GREYHOUND ASSOCIATION,
DUBUQUE RACING ASSOCIATION, LTD.,
and IOWA WEST RACING ASSOCIATION,

Respondents.

On Writ Of Certiorari
To The Supreme Court Of Iowa

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Did the Iowa Supreme Court correctly hold that Iowa's legislature violated the Equal Protection Clause by enacting a 36 percent tax on slot machine revenues at racetracks, while leaving the tax on revenues of slot machines at riverboats at 20 percent?

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JURISDICTIONAL STATEMENT

This Court should dismiss the petition for writ of certiorari as improvidently granted because the Iowa Supreme Court decision rests on adequate and independent state grounds. This Court will not review decisions implicating both state and federal constitutions where the state court "make[s] clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached." *Michigan v. Long*, 463 U.S. 1032, 1041-42 (1983). While the Iowa Supreme Court opinion *in this case* may not have contained such magic words, their absence was purely fortuitous because the court has made such "plain statements" repeatedly in the past. That court did not need to say here what it has already stated many times. The Iowa Supreme Court cited a few federal cases for inspiration. They did not mandate the outcome.

To begin with, the Iowa Supreme Court has frequently stated that it views this Court's interpretations of the Fourteenth Amendment as merely non-binding "guidance" when it interprets the Iowa Constitution.[1] "[I]t is the exclusive prerogative of our court to determine the constitutionality of Iowa statutes challenged under our own constitution." *Callender v. Skiles*, 591 N.W.2d 182, 187 (Iowa 1999); *Putensen v. Hawkeye Bank*, 564 N.W.2d

[1] Article I section 6 of the Iowa Constitution provides: "All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not belong equally to all citizens."

404, 408 (Iowa 1997). The Iowa Supreme Court has diverged from that "guidance" whenever it deems it appropriate to do so. For example, just four years ago in *Callender*, the Iowa Supreme Court expressly declined to follow this Court's interpretation of the Due Process Clause as set forth in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989). Instead, the Iowa court endorsed Justice Brennan's dissent, and held that the *Iowa* Constitution required a putative father to be given standing to challenge paternity. 591 N.W.2d at 191-92. "[W]hile federal court analysis of similar provisions in the United States Constitution may prove helpful, those interpretations do not bind us." *Santi v. Santi*, 633 N.W.2d 312, 317 (Iowa 2001). *See also Chicago Title Ins. Co. v. Huff*, 256 N.W.2d 17, 23 (Iowa 1977) (federal cases serve as guidance only); *Davenport Water Co. v. Iowa State Commerce Comm'n*, 190 N.W.2d 583, 593 (Iowa 1971) (same).

Moreover, in undertaking rational basis Equal Protection Clause analysis, the Iowa Supreme Court has deliberately charted a different path from this Court on several occasions. *See generally* Anthony Reeves, Note, "Rational Basis Revised: Iowa Equal Protection After *Gleason*, *Bierkamp*, and *Rudolph*," 67 Iowa L. Rev. 309 (1982). Thus, in *Bierkamp v. Rogers*, 293 N.W.2d 577 (Iowa 1980), the Iowa Supreme Court held that Iowa's guest statute, which prohibited guest passengers in an automobile from suing the driver of that automobile for negligence, created an improper classification in violation of Iowa's Equal Protection Clause. The court acknowledged that under the federal Constitution, it was bound by prior decisions of this Court upholding such statutes against Fourteenth Amendment challenges. *Id.* at 579. Indeed, the Iowa Supreme Court had recently held itself that Iowa's guest

statute did not violate the Fourteenth Amendment. *Bietz v. Horak*, 271 N.W.2d 755, 759 (Iowa 1978). Nonetheless, the Iowa Supreme Court invalidated the law because this Court's Fourteenth Amendment precedents were "not binding." 293 N.W.2d at 579.

Other examples of the Iowa Supreme Court's distinctive rational basis jurisprudence include: *Gleason v. City of Davenport*, 275 N.W.2d 431, 435-36 (Iowa 1979) (holding it was unconstitutional for the Iowa legislature to require notice of a claim to be given within 30 days to charter cities but only within 60 days to other municipalities); *Miller v. Boone County Hosp.*, 394 N.W.2d 776, 780-81 (Iowa 1986) (holding unconstitutional an Iowa law requiring notice to be given within 60 days or suit to be filed within six months for a claim against a local government); *Federal Land Bank of Omaha v. Arnold*, 426 N.W.2d 153, 157-58 (Iowa 1988) (holding it was unconstitutional for the Iowa legislature to allow a one-year redemption period for mortgages foreclosed by banks, savings and loans, and credit unions while allowing a two-year redemption period for other mortgages); and *Glowacki v. Board of Medical Examiners*, 501 N.W.2d 539, 541-42 (Iowa 1993) (holding that an Iowa law prohibiting courts from entering stays of disciplinary orders of the board of medical examiners violated equal protection as applied). Although the court decided these cases under both the Iowa and the U.S. Constitutions, its review was arguably more rigorous than this Court's would have been. In particular, the Iowa Supreme Court said it was obliged to consider "matters of common knowledge and common report" in determining whether legislation met the rational basis test. *Federal Land Bank*, 426 N.W.2d at 157; *Miller*, 394 N.W.2d at 779

(quoting *State v. Bartels*, 181 N.W. 508, 515 (1921)). This appears to go beyond federal equal protection precedents.

In rendering its opinion in this case, the Iowa Supreme Court relied mostly on Iowa precedents, such as *Bierkamp* and *Gleason*, rather than decisions of this Court. Pet. App. 6-17. While the Iowa Supreme Court "usually" interprets the federal and Iowa Equal Protection Clauses the same way, *see Bowers v. Polk County Bd. of Supervisors*, 638 N.W.2d 682, 689 (Iowa 2002); *Krull v. Thermogas Co.*, 522 N.W.2d 607, 614 (Iowa 1994), that is a matter of judicial preference only. As the foregoing discussion demonstrates, the Iowa Supreme Court has not hesitated to stake out its own position when it disagrees with this Court, particularly in rational basis cases.

An additional factor that must be considered here is Iowa's constitutional mandate that the legislature "encourage, by all suitable means, the promotion of ... agricultural improvement." Iowa Const. Art. IX 2nd § 3; *Dickinson v. Porter*, 35 N.W.2d 66, 76 (Iowa 1948) ("We have frequently referred to agriculture as the basic industry in this state. . . . It is not debatable that it is part of the public policy of this state, evidenced by our constitution and numerous statutes, to encourage agriculture."). The Iowa racing industry is, of course, part of Iowa agriculture. *See* Iowa Code § 99D.22(1) (requiring certain minimum use of Iowa-foaled horses and Iowa-whelped dogs by licensed racetracks). In this case, the Iowa Supreme Court specifically noted that the discriminatory tax thwarted the promotion of agriculture. Pet. App. 13. This is yet another reason why the Iowa court could be expected to stand by its previous judgment, regardless of this Court's ruling.

Finally, state's rights are involved here. These are Iowa issues, affecting Iowa citizens, resolved by a court which, until this month, convened in the same building as the Iowa legislature. It knows that legislature well. Because of the state's current budget difficulties, the Iowa Supreme Court realized its decision would be controversial, but that did not dissuade it from invalidating the discriminatory tax under both the Iowa and the U.S. Constitutions. There is no reason to believe that the Iowa Supreme Court's already expressed views on the constitutionality of Iowa Code § 99F.11 under the Iowa Constitution would be altered by a decision of this Court concerning requirements of the U.S. Constitution. As the Iowa Supreme Court has said on another occasion, "Unquestionably, this court must determine Iowa constitutional requirements, and in so doing is under no obligation to uphold a local statute merely because the United States Supreme Court has deemed it not unconstitutional." *Huff*, 256 N.W.2d at 23.

STATEMENT OF THE CASE

I. Introduction.

This case concerns the Iowa legislature's decision, as part of a rescue plan for Iowa's non-profit racetracks, to deprive those racetracks of up to 36 percent of their main source of revenue. When identical slot machines are used in the same way on for-profit riverboats, the state's maximum tax rate is only 20 percent. The Iowa Supreme Court found that this discriminatory tax on slot machine revenues at racetracks was not rationally related to a legitimate goal that conceivably could have been the Iowa legislature's actual purpose.

No one here disputes the observations of the Iowa Supreme Court that the racetracks and the riverboats "exist for the purpose of operating gambling games," "operate within the same gaming industry," "operate slot machines that are the primary revenue-making vehicle for both facilities," and "serve gambling games to the same group of consumers." Pet. App. 8-9. The simple fact is: the legislature has imposed an 80 percent higher tax on the same revenues from the same machines being used by the same types of customers, based purely on the location of those machines.

II. The Discriminatory Tax.

Iowa Code § 99F.11 imposes a tax *generally* on the adjusted gross receipts received from gambling games of 5 percent on the first $1 million of adjusted gross receipts annually, 10 percent on the next $2 million of adjusted gross receipts, and 20 percent on any adjusted gross receipts in excess of $3 million. Iowa Code § 99F.11 (first sentence).[2] Until 1994, only riverboats could offer gambling games, including slot machines and table games. The revenues from those games were taxed in accordance with the foregoing law at a maximum rate of 20 percent.

In 1994, however, the Iowa legislature ("the General Assembly") enacted H.F. 2179, which legalized slot machines at racetracks, but subjected any "gambling games at racetrack enclosures," beginning January 1, 1997, to a

[2] Adjusted gross receipts are the gross receipts less winnings paid to wagerers. Iowa Code § 99F.1. Thus, this is a tax on revenues, not profits.

special tax rate that would escalate annually up to 36 percent on adjusted gross receipts in excess of $3 million. The challenged provision, which became the second sentence of Iowa Code § 99F.11, read as follows:

> However, beginning January 1, 1997, the rate on any amount of adjusted gross receipts over three million dollars from gambling games at racetrack enclosures is twenty-two percent and shall increase by two percent each succeeding calendar year until the rate is thirty-six percent.

III. Taxation of Slot Machine Revenues in Other Jurisdictions.

No other state in our nation has such a discriminatory tax. J.A. 178. Other states that allow slot machines and/or video lottery terminals generally tax their revenues at an identical rate regardless of where the machine is located. For example, that is true in Montana, Nevada, Oregon, South Carolina, and South Dakota. J.A. 177. Louisiana, the only state besides Iowa that authorizes slot machines on riverboats and at racetracks, has a slightly lower tax rate (18 percent vs. 18.5 percent) for slot machines at racetracks. Louis. Rev. Stat. §§ 27:91, 27:393; J.A. 178. New Mexico permits video lottery terminals at racetracks and in other locations, and its gaming tax is uniformly 25 percent of the "net take." New Mexico Stat. § 60-2E-47. No other state has a tax that is 80 percent higher based solely on the location of the gambling device. J.A. 178.

Furthermore, no other state has an adjusted gross receipts tax on gaming revenue that approaches 36 percent. Illinois recently enacted a tax of 35 percent on an entity's annual adjusted gross gaming receipts above $100 million. However, the effective Illinois tax rate is much

lower because the 35 percent rate only applies when annual receipts exceed $100 million. 230 Ill. L.C.S. § 13; J.A. 178.

IV. The Legislative History of the Discriminatory Tax.

The essential facts surrounding the enactment of this unique tax are undisputed. By 1993, all the racetracks in Iowa were in financial crisis. Their racing and parimutuel betting operations were quickly losing money. Respondent Racing Association of Central Iowa ("Prairie Meadows"), based in Altoona, Iowa (outside of Des Moines), had entered bankruptcy in 1991. It emerged from bankruptcy in 1993, but continued to lose money. Respondents Iowa West Racing Association ("IWRA") and Dubuque Racing Association, Ltd. ("DRA"), which operated racetracks in Council Bluffs and Dubuque respectively, were also losing money. The Council Bluffs track ("Bluffs Run") was near insolvency. J.A. 113, 130, 139, 145.

Additionally, the Iowa riverboats were being threatened by competition from other states, particularly Illinois, which allowed excursion gambling on the other side of the Mississippi River without Iowa's stringent loss limits of $200 per excursion and $5 per hand or play. J.A. 153, 158, 163-64, 169-70.

Before the commencement of the 1994 session of the Iowa legislature, a consensus agreement was reached among representatives of the racetrack and riverboat interests and legislators from the affected areas. The consensus legislation provided for slot machines to be authorized at racetracks, the elimination of loss limits on riverboat gambling, and continuation of the existing 20

percent maximum tax rate on adjusted gross receipts from gambling games. This consensus agreement was set forth in legislation which 12 members of the Iowa House introduced as an amendment to H.F. 2179. J.A. 154-55, 159-60, 164-65, 170-71.

On March 15, 1994, however, a state representative from Woodbury County, a county on the Missouri River which contains a riverboat but no racetracks, offered an amendment that provided for a 40 percent adjusted gross receipts tax on gambling games at racetracks. Neither he nor any other supporter of the amendment gave any reasons in the House debate for a higher tax on the same machines at racetracks. J.A. 155, 160, 165-66, 171-72.

On March 17, after meeting with supporters of the consensus legislation, this representative agreed to have his amendment reconsidered so that the highest rate on gambling games at racetracks would be 36 percent rather than 40 percent of adjusted gross receipts, and to provide a two-year moratorium (*i.e.*, until January 1, 1997) for the higher rate to begin to take effect in order to give racetrack supporters an opportunity to repeal the tax disparity in the next General Assembly. J.A. 155-56, 161, 166, 172.

As so amended, H.F. 2179 passed the Iowa House that day. It later passed the Iowa Senate and was signed by the Governor. The Speaker of the Iowa House, who was a gambling opponent and controlled the House agenda, had made it clear that he would allow H.F. 2179 to be considered only once in the House. Thus, as a practical matter, any effort to remove the discriminatory tax in the Senate would have defeated the entire legislation. J.A. 155-56, 160-61, 165-66, 171-73.

The text of H.F. 2179 leaves no doubt that slot machines were intended to save the racetracks from financial oblivion. For example, the legislation states that these slot machine revenues, after payment of operating expenses and taxes, shall be used first to pay any "unpaid debt from the parimutuel racetrack operations." *See* Iowa Code § 99F.6.

However, the Iowa legislature failed to amend § 99F.11 in subsequent sessions. Thus, in 1997, the higher tax rate began to take effect for slot machine revenues at racetracks only. By June 2002, the date of the Iowa Supreme Court's decision, it had reached 32 percent and was scheduled to reach 36 percent by 2004. No other activity is taxed by the State of Iowa at a rate of 36, or for that matter, 32 percent. By way of comparison and contrast, Iowa imposes a 22 percent tax on sales of tobacco products. Iowa Code § 453A.43.

V. The Impact of the Discriminatory Tax.

As noted above, each of the Respondents is a non-profit entity. By Iowa law, these entities are required to distribute any net income (not used to pay off debts or to supplement horse or dog purses) for educational, civic, public, charitable, patriotic or religious uses. Iowa Code § 99F.6(4)(a). As a practical matter, this means that the net income of the Respondents is plowed back into the community, either through payments to local governments or through charitable contributions.

Respondent Prairie Meadows has distributed over $186 million to Polk County (the county that includes both Altoona and Des Moines) and over $12 million to various charities from 1995 through 1999. Respondent DRA has

distributed over $7.5 million to charities and over $27.5 million to the City of Dubuque. Bluffs Run has distributed over $45 million to various educational, civic and charitable organizations in over fourteen counties in southwest Iowa since 1995. J.A. 123-24, 129, 141-42.

Each of the racetracks continues to lose money today on the racing portion of its operations, and depends on slot machine revenues for survival. However, as the higher tax on gaming revenues from slot machines at Iowa racetracks has phased in, that tax has had a predictably adverse impact on the racetracks. Had the Iowa Supreme Court not struck down the tax, Respondent Prairie Meadows would have had little or no profits to distribute to Polk County and charities by 2003 or 2004. Meanwhile, Respondent DRA anticipated that it would have to close its facility, with a resulting loss of economic and employment benefits. It is also undisputed that Bluffs Run, which competes with riverboats in the same community, was competitively disadvantaged by the disparate gaming tax. J.A. 125, 134, 142-43, 145-47.

Petitioner's claims of a "financial bonanza" or a "windfall" for the Respondents are contrary to the record.[3] Although Petitioner does not dispute that one of the three racetracks would go out of business, he engages in pseudo-accounting (which he did not present in the Iowa courts) to try to argue that the other two tracks would "thrive" under

[3] Respondents' statement of undisputed facts was originally filed in the Iowa district court and is set forth in the Joint Appendix at pages 97-110. If Petitioner had wanted to contest any of those facts, he was required under Iowa procedure to file a statement of disputed facts, Iowa R.Civ.P. 1.981(3), which he did not do.

a 36 percent tax rate. Pet. Br. at 30 n.3. Petitioner's arguments are based on unwarranted inferences from overall revenues or certain categories of expenses only.

Revenues alone do not disclose how a racetrack is performing. It is undisputed that Respondent Prairie Meadows' "profits" (*i.e.*, what it distributed to local governments and charities) were already declining precipitously as the tax rate on revenues escalated toward 36 percent. J.A. 124. Nor are racing-related expenditures a barometer of financial health: in Iowa, racetracks are *legally required* to make those kinds of expenditures. *See* Iowa Admin. Code §§ 491-1.7(12), (13) (in deciding whether to grant or renew a license, the Iowa Racing and Gaming Commission shall consider whether the racetrack would nurture the racing industry and maximize purses).[4]

VI. Proceedings in the Iowa Courts.

Respondents originally brought this action in the Iowa District Court for Polk County. They challenged the second sentence of Iowa Code § 99F.11, which established the discriminatory tax on adjusted gross receipts from slot machines located at racetracks, as unconstitutional on several grounds. On December 4, 2000, ruling on cross-motions for summary judgment, the district court upheld the discriminatory tax and dismissed Respondents' claims.

[4] The United States, but not Petitioner, claims that Iowa riverboats actually have higher operating costs than Iowa racetracks. U.S. Br. at 12. That assertion is refuted by the undisputed evidence in this case. J.A. 125, 127.

Significantly, although Petitioner urged five possible justifications for the discriminatory tax under the rational basis test, including obviously insubstantial justifications like "revenue maximization," the district court accepted none of Petitioner's arguments. Instead, it came up with its own justification – that the legislature could have intended that river towns or riverboats receive "a beneficial tax rate" as a means of promoting their interests. *See* Pet. App. 34.[5]

On appeal, the Iowa Supreme Court reversed. To begin with, it noted:

> [T]he heart of the tax statute is in its disparate treatment of the main activity taking place at both riverboats and racetracks. That is, the essence of the tax is that it treats racetrack slot machines differently than riverboat slot machines. . . .

Pet. App. 8.

Critically, the Iowa Supreme Court then pointed out – and Petitioner had never argued otherwise – that the Iowa legislature's undisputed purpose in 1994 was to save the racetracks and the riverboats from economic distress. Levying an 80 percent higher tax on the revenues from slot machines at racetracks frustrated that goal. Reviewing both the justification developed by the district court and the various justifications advanced by the State, the court concluded that "[e]ach justification ignores the plain

[5] Petitioner characterizes this as three separate justifications. Pet. Br. at 23. Regardless, they are all "promotional" justifications, and none of them was initially urged by Petitioner.

fact that this differential tax completely defeats the alleged purpose of the 1994 legislation." Pet. App. 15. The court added:

> At a minimum, the tax frustrates the legislative purpose in permitting racetracks to operate. The legislation goes even further, however, by disabling an industry it was allegedly designed to aid.

Pet. App. 15.

On January 17, 2003, this Court granted the Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

This case presents the question whether a unique and draconian tax should be upheld despite a record affirmatively demonstrating that the tax is not rationally related to – and indeed undermines – the legislature's actual purpose. Since legislatures do not normally act in such an arbitrary manner, we need to ask how that happened here. It occurred because a legislator from a riverboat district was able to add a last-minute "poison pill" amendment to legislation authorizing slot machines at racetracks. The amendment provided for a confiscatory tax on slot machine revenues at racetracks, but not at riverboats. Because the legislature was nearing the end of its session, and the racetracks were facing their financial demise, the supporters of the legislation decided to swallow this unpalatable medicine with slight modifications and a delayed start date, figuring they could eliminate it in a later legislative session before it took effect. That never happened. So, the Iowa courts had to sort out this messy

situation involving a law that the legislature had intended to revise, but never had revised.

The Iowa Supreme Court, which was far closer to this controversy than many of the parties who now offer their advice to this Court, reviewed the record, including the unrebutted legislator affidavits, and held that the discriminatory tax was not rationally related to the Iowa legislature's unquestioned purpose of helping the racetracks (and the riverboats) recover from economic distress. Legislatures can do many things, but they cannot target a small class of entities for adverse treatment in the guise of helping them, as happened here. It is inherently arbitrary for a legislature to bless an industry, as the Iowa legislature did with the gaming industry in H.F. 2179, and then at the same time to subject some of the participants in that industry to an incapacitating tax burden with no other purpose than to harm them.

After fully considering these points, the Iowa Supreme Court struck down the second sentence of Iowa Code § 99F.11 as violating the Equal Protection Clauses of the Iowa and U.S. Constitutions.

The Iowa Supreme Court's application of the Fourteenth Amendment's Equal Protection Clause was correct and should be upheld by this Court. The Iowa court rightly characterized the case as a "rational basis test" case, and recognized that the Respondents had a "heavy burden" and had to "negate every reasonable basis upon which to uphold the statute." However, as the Iowa Supreme Court put it, "[R]ational basis review of a taxing scheme is not tantamount to no judicial review." Pet. App. 7. This Court has agreed. *Mathews v. De Castro*, 429 U.S. 181, 185

(1976) (observing that rational basis review is not "toothless").

Hence, this Court has invalidated taxation schemes under the Equal Protection Clause where warranted. *Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster Cty.*, 488 U.S. 336, 344-46 (1989) (striking down discriminatory property tax assessment scheme); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 623 (1985) (striking down modest property tax exemption accorded to Vietnam War veterans who were New Mexico residents before May 1976); *Williams v. Vermont*, 472 U.S. 14, 22-24 (1985) (reversing dismissal of a challenge to a Vermont vehicle use tax exemption).

In particular, even in the realm of economic regulation, the Equal Protection Clause stands as a bulwark against "intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam) (reversing dismissal of equal protection claim) (quoting earlier cases). And this protection against intentional and arbitrary discrimination would be meaningless if legislation could be upheld based on synthetic justifications that conflict with the undisputed actual purpose of the legislature.

This Court has repeatedly recognized this very point. Thus, while it has said that the rational basis test permits a law to be sustained by "rational speculation," *Heller v. Doe*, 509 U.S. 312, 320 (1993), a law may not be upheld when "the facts preclude[] any plausible inference" that an asserted justification was the actual legislative purpose. *Nordlinger v. Hahn*, 505 U.S. 1, 16 (1992). In other words,

positing a justification that "could not have been the genuine goal of the legislation" (to borrow the Iowa Supreme Court's paraphrasing of *Nordlinger*) goes beyond the permissible boundaries of the rational basis test. "[T]his Court's review does require that a purpose may conceivably or 'may reasonably have been the purpose and policy' of the relevant government decisionmaker." *Id.* at 15 (quoting *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 528-29 (1959)).

This line of authority makes it impossible to maintain that real-world facts are always irrelevant. Under the rational basis test, a court has a duty to accept unrebutted facts when they show that a claimed purpose could not have been the legislature's actual goal. Conversely, when presented with the kind of record that Respondents have submitted, courts are not required to engage in Alice-in-Wonderland reasoning that a punitive tax on racetrack revenues, which was not planned to take effect, was really an effort to promote the economic development of riverboats or river towns. Nor are they required to indulge other fictions – for example, that the legislature was compensating for the greater mobility of riverboats, or that it was accounting for their supposed (but really nonexistent) higher costs. Because the Iowa Supreme Court correctly concluded that the asserted justifications could not have been the legislature's actual goal, it properly struck down this bizarre tax law that takes away over a third of slot machine revenues from racetrack casinos, while allowing riverboat casinos to retain four-fifths of those identical revenues.

ARGUMENT

THE IOWA SUPREME COURT'S APPLICATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO IOWA CODE § 99F.11 WAS CORRECT AND CONSISTENT WITH THIS COURT'S PRECEDENTS

I. The Rational Basis Test Is Not a License to Spin out Justifications for a Law that Could Not Conceivably Have Been the Legislature's Actual Goal.

A. The *Nordlinger/Allegheny Pittsburgh* Principle.

The Iowa Supreme Court followed the correct analytical framework in this case. It held – and Respondents agree – that all possible justifications given for the discriminatory tax must be negated. Pet. App. 7; *Hooper*, 472 U.S. at 618-22 (striking down a New Mexico law after rejecting both justifications that had been accepted by the New Mexico court). Under this Court's rational basis precedents, however, a justification for a legislative classification is insufficient if it fails to meet one or more of the following three requirements: (a) legitimate state purpose; (b) reasonable relationship between means and ends; and (c) the purpose could have been a plausible basis for the legislation. Thus, even though most legislation passes the rational basis test, there are three ways to overcome a potential justification.

This is confirmed by this Court's decisions which embody the following rules:

- To satisfy the rational basis test, the classification must further a legitimate state purpose. For example, in *Hooper*, this Court struck down the New Mexico veteran's tax exemption for pre-1976 residents because it did not further a legitimate state purpose. 472 U.S. at 623.

- The relationship between the classification and its goal must not be "so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985). There must be a "reasonable" relationship, not a "casual" relationship, between the means and the ends. *Williams*, 472 U.S. at 23 n.8. Thus, in *Romer v. Evans*, 517 U.S. 620 (1996), this Court applied the rational basis test to invalidate Colorado's anti-gay rights amendment, rejecting several asserted justifications (such as private citizens' freedom of association) on the ground that "[t]he breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them." *Id.* at 635.

- Even if the purpose is permissible and the means are not attenuated, that may not be enough. If the party challenging the legislation can show that the asserted "justification" could not actually have been relied upon, then it may not be used to uphold the statute. *Nordlinger*, 505 U.S. at 15-16.

The Iowa Supreme Court adhered to these established principles in its decision. It carefully considered both the justifications that had been advanced by Petitioner and the one that the trial court had relied upon. Pet. App. 11-15. Citing *Nordlinger*, it found that these asserted justifications could not be reconciled with the undisputed actual purpose of the legislation.

As this Court said in *Nordlinger*, "[T]his Court's review does require that a purpose may conceivably or 'may reasonably have been the purpose and policy' of the relevant governmental decisionmaker." *Id.* at 15. The *Nordlinger* Court gave *Allegheny Pittsburgh*, 488 U.S. 336, as an example of a case "where the facts precluded any plausible inference" that the asserted purpose for a taxing scheme was the actual purpose. 505 U.S. at 16.[6] In *Heller*, 509 U.S. at 321, this Court reaffirmed that "even the standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation."

In other words, while a court is entitled to engage in "rational speculation" concerning the legislature's goal, and that speculation need not be supported by actual evidence, *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993), the court may not attribute a purpose to the legislature that the record affirmatively shows could not have been the legislature's goal. "This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislature." *Weinberger v. Weisenfeld*, 420 U.S. 636, 648 n.16 (1975).

[6] The "facts precluded" language appears to be an echo of this Court's famous description of the rational basis test in *United States v. Carolene Prods. Co.*: "[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of *the facts made known* or generally assumed it is of such a character as to *preclude the assumption* that it rests upon some rational basis within the knowledge and experience of the legislators." 304 U.S. 144, 152 (1938) (emphasis added).

See also Kadrmas v. Dickinson Public Schools, 487 U.S. 450, 463 (1988) (stating that legislation should not be upheld when "the legislative facts on which the legislation is apparently based could not reasonably be conceived to be true by the governmental decisionmaker") (quoting *Vance v. Bradley*, 440 U.S. 93, 111 (1979)).

Allegheny Pittsburgh, a tax case, illustrates this point. There, a West Virginia county followed a method of property assessment that resulted in only minor adjustments to assessed value for property tax purposes until a property was sold, at which time a full market value adjustment would be made. While the Court suggested in *Allegheny Pittsburgh* and confirmed in *Nordlinger* that this method of property tax classification might have served a legitimate goal and thereby met the rational basis test in an appropriate case, it did not do so there because relevant sources showed that West Virginia had intended to adopt a true market value approach. In short, the legislation failed the rational basis test because the hypothetical goal advanced in the litigation conflicted with the unquestioned actual legislative goal of a market value method of property assessment. *Allegheny Pittsburgh*, 488 U.S. at 345.

The Iowa Supreme Court correctly held that this was an *Allegheny Pittsburgh*-type of case. The undisputed purpose of the 1994 legislation was "to help the racetracks recover from economic distress." Pet. App. 11. Yet the legislation "also increased the tax on racetrack slots at a rate eighty percent higher than the tax imposed on riverboat slots." *Id.* One cannot justify such a surtax as a way of promoting riverboats or river towns, as the trial court attempted to do, because such a justification does not comport with "the realities of the subject addressed by the

legislation." *Heller*, 509 U.S. at 321. As noted by the Iowa Supreme Court, the 80 percent higher tax burden on slot machine revenues at racetracks would be a rational way of promoting the riverboat gambling industry only if "the reason for it was to drive the racetracks out of business" – a purpose which is illegitimate and which also conflicts with the unquestioned actual goal of the 1994 legislation. Pet. App. 14.[7] To put it another way, this is another one of those admittedly rare cases where the discrimination is simply irrational in the context of the undisputed legislative goal.

B. Petitioner's and the United States' Arguments Against the Application of That Principle Miss the Mark.

To try to escape this logic, Petitioner now makes three separate arguments, none of which is availing. First, Petitioner argues that *Allegheny Pittsburgh* is limited to situations where the legislative purpose was expressly written into law. Pet. Br. at 22. According to Petitioner: "In the absence of such codification of the purpose of a law, courts may look to state interests for a law articulated by legal counsel defending the classification or to state interests for the law found by lower courts, or may itself identify another possible state interest that would justify the law." *Id.*

[7] As this Court has noted, a bare desire to disadvantage or harm a particular group is not a legitimate state interest. *Cleburne*, 473 U.S. at 447.

This is a misreading of this Court's precedents. Nothing in *Allegheny Pittsburgh* indicates that the legislative purpose has to be codified. Rather, this Court said it would look to any "authoritative source," including the opinions in that case of the West Virginia Supreme Court and Court of Appeals. 488 U.S. at 345. Here, the Iowa Supreme Court (an "authoritative source" in this Court's view) found that the legislative purpose behind the 1994 legislation was undisputed. Federal courts, including this Court, should defer to that determination, especially when there is no evidence to the contrary. *See Dorchy v. Kansas*, 264 U.S. 286, 290 (1924) (discussing a severability question and holding that "[t]he task of determining the intention of the state legislature in this respect, like the usual function of interpreting a state statute, rests primarily upon the state court"); *Lloyd A. Fry Roofing Co. v. Wood*, 344 U.S. 157, 160 (1952) (holding that this Court should defer to factual determinations of a state supreme court absent exceptional circumstances).

It is true that in *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 460-64 & n.6 (1981), a rational basis equal protection case, this Court declined to defer to the Minnesota Supreme Court's findings regarding the anticipated consequences of the challenged law. There, the plaintiffs had presented empirical data to show that the law would not achieve its intended purpose. The Minnesota Supreme Court accepted the plaintiffs' data, although the evidence was "in sharp conflict," and invalidated the law. This Court reversed, noting that "[w]here there was evidence before the legislature reasonably supporting the classification, litigants may not procure invalidation of the legislation merely by tendering evidence in court that the

legislature was mistaken." *Id.* at 464. Two critical distinctions exist here. First, there is no conflict in the evidence; Respondents' facts are unrebutted. Second, and even more importantly, Respondents' evidence primarily addresses an entirely different subject – *i.e.*, not the expected effects of the differential tax (which were self-evident anyway), but the circumstances surrounding the enactment of the legislation. There is no precedent of which we are aware for this Court to second-guess the findings of a state supreme court on uncontradicted evidence regarding a state legislature's intent and purpose.

Similarly, *Nordlinger* in no way supports Petitioner's "codification" rule. *Nordlinger* did not say that the only "facts" capable of "precluding" an asserted legislative purpose are those expressly written into a statute. Indeed, had this Court intended to adopt such a rule, it could have said so, but it did not. And such a rule would make little sense. If that were the rule, a legislature could insulate its actions from review simply by omitting a "purpose" clause from the statute, as the Iowa legislature did here.[8]

Second, Petitioner criticizes the Iowa Supreme Court for considering legislator affidavits, suggesting that this was somehow improper. Pet. Br. at 28-29. However, the Supreme Court decision cited by Petitioner, *Bread Political Action Committee v. Federal Election Comm'n*, 455 U.S. 577, 581 n.3 (1982), holds only that the *post hoc* views of a single legislator concerning legislative intent carry little

[8] Notably, *Nordlinger* emphasized that *Allegheny Pittsburgh* applies to challenges to statutes as well as administrative actions. *Id.* at 16. n.8.

weight. In a more recent election law case, *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 393 (2000), this Court credited a single legislator's affidavit, the difference apparently being that the legislator there was co-chair of the relevant committee and was testifying not as to what a statute meant, but as to concerns the legislature was attempting to address. As in *Nixon*, the affidavits here are not *post hoc* attempts to interpret a statute; rather, they are historical recitations of events by major participants in those events. J.A. 152, 157, 162-63, 168, 174. *See also Hunt v. Cromartie*, 526 U.S. 541, 549 (1999) (considering the affidavits of two legislators regarding the purpose behind a redistricting plan). As this Court has previously recognized, those events are relevant to equal protection analysis in a case like this. *See Weinberger*, 420 U.S. at 648 n.16 (approving "an examination of the legislative scheme and its history").

Moreover, as a matter of precedent and common sense, whether an Iowa court will consider affidavits of Iowa legislators should be a matter of *Iowa* law. *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 309 n.5 (1945) ("a state court may determine for itself what sources of extrastatutory enlightenment it will consult") (holding that a state court is not obligated under the Fourteenth Amendment to take testimony from state legislators). Petitioner implicitly recognizes this point by citing two *Iowa* cases to this Court. This means, however, that Petitioner has no cause to complain *in this Court* because the Iowa Supreme Court considered the legislators' sworn testimony. In any event, Petitioner also has an incorrect view of Iowa law. The two Iowa cases that he cites discuss a legislator's private interpretation of a statute, which is not the situation here. Long ago, the Iowa trial court

rejected those Iowa decisions as inapposite. In denying Petitioner's motion to strike the legislator affidavits back in the fall of 2000, the district court cited and relied upon *Miller v. Bair*, 444 N.W.2d 487, 488 (Iowa 1989), an Iowa Supreme Court decision that took into account the affidavits of three Iowa legislators explaining the background of legislation. Pet. App. 25. *See also Donnelly v. City of Des Moines*, 403 N.W.2d 768, 771 (Iowa 1987) (stating that consideration of legislative history is appropriate).

Lastly, Petitioner creates a new argument for the benefit of this Court that "the Iowa Supreme Court improperly treated the three separate and distinct statutes enacted in 1994 as a single enactment with a single purpose. . . . " Pet. Br. at 27. This is incorrect. There was only one bill. J.A. 156, 161, 166, 172. *See* Laws of the 75th General Assembly, 1994 Session ch. 1021 ("An Act relating to gambling . . . "). And again, whether H.F. 2179 should be considered a single piece of legislation (as the Iowa Supreme Court believed it was) ought to be a matter for the Iowa courts to decide anyway.

In contrast to Petitioner, the United States does *not* argue that the scope of *Nordlinger* (and presumably *Allegheny Pittsburgh*) should be limited to legislative "codifications." It contends, rather, that *Nordlinger* is "inapposite" and the Iowa Supreme Court was being "imperceptive." According to the United States, the discriminatory tax did not defeat the purpose of the 1994 legislation to assist the racetracks because even with the tax, the racetracks were better off than before or at least the legislature could have believed they would be. U.S. Br. at 16-17. "It is obvious that Iowa racetracks are financially better off operating slot machines at a 36 percent rate than not operating slot machines at all – otherwise, they

would simply elect *not* to operate slot machines." *Id.* at 16. These arguments, however, are precluded by the facts and record, which show: (a) that the 36 percent tax rate resulted from the proposal of a riverboat legislator; (b) that a moratorium was enacted so there would be an opportunity to repeal the rate before it took effect; and (c) that the racetracks were heading rapidly downhill and had no choice but to accept whatever deal the legislature offered in the hope that they could later get the tax rate amended. Moreover, the relevant question is not whether a 36 percent tax rate eliminates all possible benefits of the legislation for racetracks, but whether the undisputed facts and record eliminate any of the possible justifications for the 36 percent tax rate and classification urged before the courts.

The fundamental question presented by this case is whether the rational basis test is just an exercise in abstract thinking. That is, are facts irrelevant? Can a statute be upheld on the basis of someone's creative thinking, even if that could never have been the justification in the real world? Historically, this Court has rejected such an approach. Rather, to determine whether government has behaved arbitrarily requires some reference to the actual context within which the government acted. *See Nordlinger*, 505 U.S. at 15-16; *Allegheny Pittsburgh*, 488 U.S. at 344-46; *Kadrmas*, 487 U.S. at 463; *Weinberger*, 420 U.S. at 648 n.16. Just three years ago, in *Olech*, this Court held that claims of arbitrary and intentional discrimination, including claims of discrimination "occasioned by express terms of a statute," state a cause of action under the Equal Protection Clause, requiring further factual development. 528 U.S. at 564-65. But if the legislature's actual goals were irrelevant, further factual development

would *never* be necessary. Rational basis cases could always be decided on the basis of the express terms of the legislative language, coupled with a minimal amount of reasoning. In short, Petitioner's position cannot be squared with this Court's decision in *Olech*.[9]

Good faith is presumed, so in a factual vacuum the Court is entitled to engage in rational speculation, but the Court cannot engage in counter-factual speculation that is refuted by the actual record. Allowing such speculation would open the door to truly arbitrary action, as when a legislature tags disfavored participants with a highly discriminatory tax in legislation whose undisputed purpose is to help all participants in that industry.[10]

This approach also is consistent with this Court's long-held views of what the term "arbitrary" means in

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[9] This Court granted certiorari in *Olech* on the question whether equal protection claims can be asserted by a "class of one." 528 U.S. at 564. This Court held that "the number of individuals in a class is immaterial for equal protection analysis," and that "subjective ill will" is not required to state a claim under the rational basis test. *Id.* at 564-65. Even though such elements are not required, this case has certain overtones that should heighten this Court's concern. As noted above, only three entities were affected by the discriminatory tax, and it was introduced by a riverboat district legislator.

[10] Petitioner argues that a legislature can tax a business to destruction if it wants to without violating the Due Process Clause. Pet. Br. at 32-33. That is an overly simplified reading of this Court's precedents. For example, in *City of Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369, 378 (1974), this Court went through a factual analysis showing that due to the demand for parking in Pittsburgh, the tax would not have the deleterious impact that the plaintiffs had predicted. But in any event, this case involves something more – the inclusion of a discriminatory and devastating tax on a few industry participants in a law intended to bail out the industry as a whole.

other areas, such as a labor union's duty of fair representation. In its fair representation jurisprudence, this Court has equated the union's freedom of action with that of a legislature under the rational basis test. *Air Line Pilots Ass'n Intern. v. O'Neill*, 499 U.S. 65, 75, 78 (1991) (noting that "[e]ven legislatures, however, are subject to *some* judicial review of the rationality of their actions"). At the same time, though, this Court has made it clear that whether a union's actions are arbitrary must be measured "in light of the factual and legal landscape at the time of the union's action." *Id.* at 67. Thus, in fair representation cases, as in economic equal protection cases, rational speculation is acceptable; but speculation contrary to the undisputed "factual landscape" is not. The factual backdrop matters.

II. The Supposed Justifications Offered by Petitioner and the United States for the Discriminatory Tax Fail the Rational Basis Test.

Given that the Iowa Supreme Court followed the correct analytic framework, it is not surprising that it came to the right result. Petitioner and the United States now try to offer an array of justifications for taxing slot machine revenues at highly disparate rates solely based upon the location of the slot machine. Two points, however, are worth noting at the outset. First, Petitioner relies on at least one justification – "grandfathering" – that he has never argued before in the five years of this litigation. Second, Petitioner primarily emphasizes a justification – "promotion" – that he did not advance until this litigation reached the Iowa Supreme Court, more than two years after it was commenced. We now turn to these asserted justifications.

A. The Promotional Justification Fails the Rational Basis Test.

The best argument for the discriminatory tax, according to the current thinking of both Petitioner and the United States, is that the 36 percent tax rate on slot machines at racetracks was a rational way for the Iowa legislature to promote the interests of riverboats or river towns. Pet. Br. at 23-24; U.S. Br. at 11. However, to make this argument, these parties have to turn the factual record upside down, citing the Court to a host of tax exemption cases. Their authorities are inapposite because they involve tax *relief* for specific industries or entities intended to promote those industries, whereas the undisputed factual record shows that this case involves enactment of a tax *burden* on a narrow group of taxpayers. In short, as the Iowa Supreme Court correctly held, the "promotional" justification cannot be squared with the actual facts surrounding enactment of § 99F.11.

Consider, for example, *Allied Stores*, 358 U.S. 522, and *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1937), the two decisions cited most prominently by Petitioner and the United States in their briefs. In *Allied Stores*, this Court upheld an Ohio exemption from property taxes for property stored by nonresidents in warehouses. This Court concluded that it was reasonable for Ohio to try to promote the Ohio warehouse industry by encouraging nonresidents to store their goods in Ohio. 358 U.S. at 528-29. The Court did say that States "may impose different specific taxes upon different trades and professions. . . . " *Id.* at 527. Yet the Court also said that a state "may not resort to a classification that is palpably arbitrary." *Id.*

Similarly, in *Carmichael*, this Court rejected a challenge to the Unemployment Compensation Act of Alabama which exempted certain categories of employees – *e.g.*, agricultural laborers, charitable enterprises, etc. The Court said, "The legislature may withhold the burden of the tax in order to foster what it conceives to be a beneficent enterprise. This Court has often sustained the exemption of charitable institutions [citations omitted] and exemption[s] for the encouragement of agriculture [citations omitted]." 301 U.S. at 512. Ironically, in *Carmichael*, the Court was upholding a favorable tax treatment of agriculture. *See also Lehnhausen v. Lake Shore Auto Parts*, 410 U.S. 356, 365 (1973) (upholding the elimination of the *ad valorem* tax as to personal property owned by individuals but not corporations; also observing that there were serious problems enforcing the tax with respect to individuals and that the state's plan was eventually to eliminate the tax as to everyone).

These tax exemption cases do not apply here for the plain reason that this case does not involve a tax benefit intended to boost a particular industry. The Iowa legislature did not enact a tax exemption for riverboats in 1994. A maximum 20 percent tax rate already was in effect. Instead, in legislation that was supposed to bail out the racetracks, the legislature singled them out for higher taxation. Hence, after reviewing the undisputed legislative history, the Iowa Supreme Court correctly concluded that the asserted "promotional" justification could not have been the legislature's actual goal. Pet. App. 15. It does not have a reasonable relation to the "object of the legislation." *Allied Stores*, 328 U.S. at 527. That conclusion is unassailable on this record.

This is thus a case like *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), where this Court invalidated an amendment that denied food stamp eligibility to any household containing persons who were not related to each other. Although the government argued that the amendment was rationally related to a legitimate legislative goal of preventing fraud, this Court noted that the Food Stamp Act already contained strong anti-fraud provisions. As it explained, "The existence of these provisions necessarily casts considerable doubt upon the proposition that the 1971 amendment could rationally have been intended to prevent those very same abuses." *Id.* at 536-37. The same analysis applies here. The second sentence of Iowa Code § 99F.11 must be considered within the factual context in which it was enacted, because Respondents provided that context. Since these facts show that the provision was an effort to disfavor the racetracks, not a promotional tax exemption for riverboats or river towns, the "promotional" justification cannot be credited.

The United States argues that the Iowa Supreme Court "misperceive[d] the nature of rational-basis review" because it observed that a differential tax rate was not the "only" way to promote riverboat history. U.S. Br. at 17; Pet. App. 15. We agree that rational basis review does not require a legislature to pick the *best* way to do something. However, the United States has read the Iowa Supreme Court's opinion out of context. The constitutional flaw in the discriminatory tax was that it conflicted with the undisputed legislative goal of resuscitating the racetracks. The Iowa Supreme Court was merely making the additional point that the Iowa legislature could have served the alleged goal of promoting riverboats and river towns – if that were truly the legislature's goal – in many other

ways that did not conflict with that unquestioned legislative goal of preserving the tracks. *See Williams*, 472 U.S. at 23 n.8 (making a similar point).

In summary, Petitioner's characterization of the discriminatory tax as a "tax benefit" for the riverboats (Pet. Br. at 22) simply is not grounded in the realities of the legislation, *Heller*, 509 U.S. at 321, which may explain why Petitioner never asserted that justification until the trial court conceived it, more than two years after the case had been filed. The undisputed facts remain that the across-the-board tax stood at 20 percent, until a last-minute amendment raised it to 36 percent on gambling games at land-based casinos only. The fanciful notion that this was a master plan to promote riverboats and river towns "could not reasonably be conceived to be true by the governmental decisionmaker." *Kadrmas*, 487 U.S. at 463.

Furthermore, even if promotion of riverboats or river towns could have been the actual goal, the means would still have had to bear some *reasonable* relationship to those ends. A relationship that is "far removed," *Romer*, 517 U.S. at 635, or "casual," *Williams*, 472 U.S. at 23 n.8, does not suffice. Yet here, imposing a confiscatory tax on racetracks (to be phased in over a period of ten years from the date of enactment of the legislation) would be at best a very crude and indirect way of "promoting" riverboats and river towns. As the Iowa Supreme Court rightly perceived, the district court's "promotion" justification only makes sense if the tax "drive[s] the racetracks out of business, thereby helping the riverboat industry." Pet. App. 14. Not only is it "impossible to conclude" the legislature actually had this purpose in mind, *id.*, but such a means-ends relationship is highly attenuated at best.

B. The Other Asserted Justifications Fail the Rational Basis Test.

Petitioner and the United States offer several secondary justifications for the discriminatory tax in § 99F.11. These, however, suffer from similar infirmities.

Mobility. Both Petitioner and the United States claim that the legislature was justified in imposing a 36 percent tax on slot machine revenues at racetracks but not riverboats because riverboats are more "mobile." Pet. Br. at 24, 26; U.S. Br. at 12. However, neither Petitioner nor the United States cite any precedent that allows a taxing authority to discriminate in favor of groups based on their perceived ability to leave the taxing authority and thereby avoid the tax. By that logic, Iowa could impose lower taxes on wealthy urban Iowans than on less affluent rural farmers because the city dwellers could more readily move out-of-state. In fact, Petitioner's argument cuts the other way. Courts should be more concerned about protecting persons who *cannot* avoid a tax. "The fact that it may be rational or beneficent to spare some the burden of double taxation does not mean that the beneficence can be distributed arbitrarily." *Williams*, 472 U.S. at 27.[11]

[11] Furthermore, even if discriminating in favor of taxpayers that have the capability of leaving the state were an acceptable legislative purpose, the means chosen are not reasonably related to the end. The discrimination in Iowa Code § 99F.11 favors all riverboats, whether they are capable of leaving the state *or not* (such as Lakeside Casino in Osceola, which is land-locked in south central Iowa). Moreover, there is no requirement that riverboats agree to remain in the state in return for the favorable tax treatment.

Additionally, as the Iowa Supreme Court noted, Pet. App. 15, the mobility justification fails for the further reason that it could not have been the Iowa legislature's actual purpose. Contrary to the dissent's assertion, the legislature did not "create economic incentives" in the field of taxation for riverboats in 1994, Pet. App. 18, and no amount of verbal gymnastics can alter this reality.

Compensating for "high" expenses. Petitioner and the United States argue that certain expenses incurred by the riverboats (which have to make token "excursions" onto the water during the warmer months – *see* Iowa Admin. Code § 491-5.6(2)) could rationally support a higher level of taxation on slot machine revenues at racetracks. Pet. Br. at 25; U.S. Br. at 12. Significantly, Petitioner does not argue that riverboats actually have *higher* operating expenses than racetracks; that would be untrue. J.A. 127. Racetracks, unlike riverboats, must support money-losing parimutuel racing operations.

The United States argues that a 1993 "Gambling Study Committee" in Iowa (actually known as a "Gaming Study Committee") had recommended a tax of up to 24 percent on the racetracks, because they could "function with a lower operating cost." U.S. Br. at 4 n.1. The Gaming Study Committee apparently drew its conclusion about operating costs out of thin air. No financial information supported that statement. J.A. 175. In any event, the means utilized are far too attenuated and distant from the hypothesized ends to meet the rational basis test. As attested by the Iowa Senate President, who was a member of the Gaming Study Committee, the committee "never discussed or contemplated a gaming tax disparity of this degree." J.A. 176.

An 80 percent higher tax rate (36% vs. 20%) is qualitatively different from the 20 percent higher tax rate that had been recommended by the Study Committee (24% vs. 20%) because it is undisputed that the 36 percent tax poses a real threat to the economic viability of Iowa's racetracks and their community contributions. There is no conceivable justification for a confiscatory and punitive tax rate that is nearly double the rate on slot machine revenues on riverboats. Different treatments must not "be so disparate, relative to the difference in classification, as to be wholly arbitrary." *Walters v. City of St. Louis*, 347 U.S. 231, 237 (1954). They must rest on "real and not feigned differences." *Id.*

The *Nordlinger/Allegheny Pittsburgh* rule also applies here. The record affirmatively shows that the alleged (but nonexistent) greater burdens on riverboats were *not* the basis for the discriminatory tax enacted by the Iowa legislature. The discriminatory tax did not have anything to do with the Gaming Study Committee's report. Indeed, the consensus legislation that actually emerged following that committee's work provided for all slot machine revenues to be taxed at the preexisting 20 percent rate. J.A. 155-56, 160-61, 165-66, 171-72, 175-76.

Grandfathering. Lastly, Petitioner and the United States argue that it could have been important to protect the supposedly settled tax expectations of "existing vendors" – *i.e.*, the riverboats – by not subjecting them to the higher 36 percent tax rate. Pet. Br. at 25; U.S. Br. at 13. But of course, the discrimination was not based on whether the business was "existing" or not, but whether it was a racetrack or a riverboat. Notably, Petitioner contradicts himself on the next page of his brief and hypothesizes that the discrimination could have been intended to

attract *more* riverboats, obviously none of which had settled expectations. Pet. Br. at 26.

Petitioner and the United States apparently want this Court to announce a general rule that "grandfathering" provisions always pass the rational basis test. That would be unfortunate and wrong. If that were the standard, the government could engage in the most egregious discrimination against new entrants into a business (as it has done here), while asserting the makeweight argument that it is protecting the settled expectations of the existing entrants. A careful reading of this Court's precedents indicates, however, that it has not upheld grandfathering *for its own sake* as a legitimate legislative goal, but only as a step-by-step means of achieving some other plausible goal. In particular, where the government's purpose is to *terminate* an activity or a benefit for otherwise legitimate reasons, it may do so gradually, "grandfathering" the rights of those that already engage in that activity. *See United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 176-77 (1980) (Congress could phase out duplication of railroad retirement benefits and social security benefits while protecting retirees and certain existing workers); *City of New Orleans v. Dukes*, 427 U.S. 297, 304-05 (1976) (New Orleans could phase out street vendors in the French Quarter while allowing existing vendors to keep operating). No one contends that was the Iowa legislature's goal here.[12]

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[12] Grandfathering *qua* grandfathering is not an appropriate legislative goal for the same reason that rewarding those citizens who have lived longer in a state is not an appropriate goal: "In almost all instances, the business of the State is not with the past, but with the

(Continued on following page)

III. The Iowa Supreme Court Did Not Engage in Improper Fact Finding.

Petitioner's accusations of improper "fact finding" by the Iowa Supreme Court fundamentally misconceive rational basis review. We agree that the government is generally not required to prove by evidence that a piece of legislation actually *works*, *i.e.*, that it furthers a permissible goal. *Beach Communications*, 508 U.S. at 315 (holding that a legislative choice may be based on rational speculation "unsupported by evidence or empirical data"). But Petitioner is arguing something altogether different: that a court should never consider evidence in hearing a constitutional challenge under the rational basis test. If that were the case, obviously no challenge could ever succeed or even get past the Rule 12(b)(6) dismissal stage, yet some do. This Court should not embrace Petitioner's radical views. *See Clover Leaf Creamery*, 449 U.S. at 464 (noting that "parties challenging legislation under the Equal Protection Clause may introduce evidence supporting their claim that it is irrational").

Petitioner's confusion is exemplified by his flawed attempt to analogize this case to *Central State Univ. v. American Ass'n of Univ. Professors*, 526 U.S. 124 (1999) (per curiam).[13] In *Central State*, the Ohio Supreme Court held that a law authorizing public universities to develop workload standards for professors and exempting their

present: to remedy continuing injustices, to fill current needs, to build on the present in order to better the future." *Zobel v. Williams*, 457 U.S. 55, 70 (1982) (Brennan, J., concurring).

[13] The United States does not argue that *Central State* is comparable to this case.

workloads (but not those of other public employees) from collective bargaining violated the Equal Protection Clause. The State had argued that the law was an attempt to address a decline in the amount of teaching performed by professors. However, in the critical passage of its opinion, the Ohio court concluded that "not a shred of evidence in the entire record" linked collective bargaining with the decline in teaching over the last decade. 699 N.E.2d 463, 469 (Ohio 1998). This Court reversed, correctly concluding that a *lack* of evidence in the record did not "detract from the rationality of the legislative decision." 526 U.S. at 128.

However, *Central State* has no bearing here. The Iowa Supreme Court did not penalize Petitioner for failing to offer proof that the second sentence of § 99F.11 actually furthered a legitimate legislative goal. Rather, it reviewed the undisputed facts surrounding the enactment of § 99F.11, and concluded that those facts precluded an argument that the tax differential was intended to promote riverboats or river towns or to further the other asserted justifications for the statute. *See Nordlinger*, 505 U.S. at 16; *Allegheny Pittsburgh*, 488 U.S. at 344-46.

Indeed, there are two layers to Petitioner's misunderstanding of the rational basis test. To begin with, Petitioner condemns *any* consideration of evidence by the courts in rational basis cases, which is obviously too extreme. However, it is also important to distinguish between the circumstances of a legislative enactment and the enactment's subsequent effects – another distinction that Petitioner overlooks. As Respondents have already pointed out, there is ample precedent for judicial consideration of legislative history and legislator affidavits as to how the second sentence of § 99F.11 came into being. Apart from these affidavits, Respondents presented only

straightforward common-sense points regarding the impact of the discriminatory tax that were not disputed by Petitioner below. The Iowa Supreme Court captured the essence of these points in its opinion: "racetracks must pay drastically more additional tax than riverboats are required to pay" and the tax "frustrates the racetracks' responsibility to distribute money to local government and charitable organizations" and "to contribute to the overall economy of the State." Pet. App. 12-13. Those facts are self-evident and were as obvious to everyone in 1994 as they are today. They are not, and cannot be, disputed by Petitioner.

A good example of the type of analysis and outcome that Petitioner wants to foreclose is provided by *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002), decided by the Sixth Circuit just a few months ago. There the court considered, and invalidated under the rational basis test, a special interest Tennessee law that forbids anyone from selling caskets without being licensed as a funeral director. The court noted that the ban had resulted from an amendment enacted presumably at the behest of the funeral directing industry seeking to protect itself from competition. *Id.* at 222, 225, 227. The court rejected a consumer protection justification urged by the state, reasoning that "[t]he history of the legislation . . . reveals a different story." *Id.* at 227. It also rejected various safety and health justifications because there was no fit between the means and ends. According to uncontested evidence received by the district court, there is simply no connection between limiting sales of caskets to funeral directors and improving health and safety. *Id.* at 225-26. Lastly, it rejected the argument that funeral directors are better equipped to deal with the human grief associated with

buying a casket by describing it as "very weak, indeed." *Id.* at 228. Concluding that the legislation was simply economic protectionism for funeral directors, and that this was an "illegitimate purpose," the court struck it down. *Id.* at 228-29.

Craigmiles – like the Iowa Supreme Court's decision in this case – is entirely in step with this Court's rational basis precedents. The Court considered all the proposed justifications given by the state; it took into account both the state's "rational speculation" and the challengers' unrebutted evidence; and it rejected the proposed justifications because they did not meet the three prongs of the rational basis test discussed above. Iowa's discriminatory tax on slot machine revenues contains all the same flaws as Tennessee's casket sales restriction, with the added proviso that it is not even a coherent piece of economic protectionism.

IV. Petitioner and the United States Have Misstated the Scope and Impact of the Iowa Supreme Court's Decision.

While warnings of dire public policy effects are to be expected in Supreme Court briefs, the language used by both the Petitioner and the United States toward the Iowa Supreme Court strikes an unusually harsh note. Pet. Br. at 14 ("Unless balance is restored in this case, an intrusive review of legislative tax policy could dramatically shift the power to solve economic problems away from elected officials and into the courtroom"); U.S. Br. at 22 ("the rationale applied by the Iowa court would produce extraordinary and unmanageable consequences"). However, their criticism is unwarranted. Several special factors in this case confirm the arbitrariness of this discriminatory

tax – and demonstrate the Iowa Supreme Court's opinion will not have the far-reaching adverse consequences predicted by these parties.

First, a slot machine is a slot machine. As anyone who has spent five minutes on a riverboat casino knows, customers do not go there to experience "river lore," but to gamble. This is not a differential tax on two different types of gambling, as in the statutory example given by the United States. *See* 26 U.S.C. §§ 4401(a)(1) & 4401(a)(2) (higher tax on illegal gambling). It is a widely disparate tax on the same revenues from the same activity conducted on the same machines, based purely on the location of those machines. This kind of bold-faced discrimination in the tax laws is rare.

Second, the discrimination is unprecedented in its magnitude. Not only would racetracks be taxed 80 percent more than riverboats on their slot machine revenues, they would be taxed at an overall rate of 36 percent, which according to the record is higher than other taxes in the nation on gaming revenue or any other tax in Iowa. *See Romer*, 517 U.S. at 633 ("Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision"). And the consequences of that discrimination would have driven one of the three racetracks out of business and curtailed the other two racetracks' ability to make governmental and charitable contributions.

Third, the discriminatory tax originated from a unique set of circumstances. At the tail end of the legislative session, it was slapped on by a riverboat district legislator, who then agreed to modify it to delay its effect and provide an opportunity for its subsequent repeal,

which never occurred. The discriminatory tax had no logical purpose within the rescue package. It penalized some of the intended beneficiaries of that package and prevented them from reaping the intended benefits. The tax inflicted harm for harm's sake on the racetracks, and thereby undermined the undisputed goal of saving the entire gaming industry in Iowa.

The Iowa Supreme Court correctly held that this amounted to arbitrary and invidious discrimination against the racetracks. "Even under the rationality test, the legislature is not entitled to pick out a group it disfavors, declare that group to be different, and then impose a special tax burden on the disfavored group." 3 Ronald D. Rotunda and John E. Nowak, *Treatise on Constitutional Law* § 18.3 at 244 (3rd ed. 1999). *See also Olech*, 528 U.S. at 564. By no stretch of the imagination was this an effort to promote economic development. *Bona fide* economic development legislation, of which many examples exist, is in no way threatened by the Iowa Supreme Court's ruling.

CONCLUSION

For the foregoing reasons, the judgment of the Iowa Supreme Court should be affirmed.

Respectfully submitted,

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